

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

T-MOBILE USA, INC.,)	C14-1351-RAJ
)	
Plaintiff,)	SEATTLE, WASHINGTON
)	
v.)	July 28, 2016
)	
HUAWEI DEVICE USA, INC., et)	Telephone
al.,)	Conference
)	
Defendants.		

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE RICHARD A. JONES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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10:02:48 1 THE CLERK: Who do we have for plaintiffs?

10:03:11 2 MR. HUESTON: Good morning, it's John Hueston from
10:03:15 3 Hueston Hennigan. We have a number of attorneys from our
10:03:18 4 firm and from T-Mobile on the line, as you know.

10:03:24 5 THE COURT: Why don't we have people identify
10:03:26 6 themselves who will actually be participating and speaking in
10:03:29 7 the hearing.

10:03:31 8 So for plaintiffs, besides Mr. Hueston.

10:03:38 9 MR. FELDMAN: Steve Feldman of Hueston Hennigan.

10:03:44 10 THE CLERK: Okay. All right. So it's just the two
10:03:45 11 of you arguing today?

10:03:47 12 MR. FELDMAN: No. I believe Alison Plessman of
10:03:49 13 Hueston Hennigan will be joining us, if she's not on right
10:03:51 14 now.

10:03:52 15 MS. PLESSMAN: Yes, I'm on.

10:03:55 16 THE CLERK: Okay. Ms. Plessman, will you be arguing
10:03:58 17 as well today?

10:03:59 18 MS. PLESSMAN: Yes, I will be.

10:04:01 19 THE CLERK: Okay. Then for defense?

10:04:03 20 MR. HIBEY: Jim Hibey from Steptoe & Johnson in
10:04:06 21 Washington -- Washington, D.C. I will be arguing for the
10:04:11 22 defendants. There may be a necessity to have Tim Bickham or
10:04:19 23 Mike Flynn-O'Brien participate, but I'm going to try to get
10:04:23 24 through it myself.

10:04:31 25 THE CLERK: Counsel, because we have so many people

10:04:33 1 on the line and we do have a court reporter here, it's
10:04:36 2 important that before you speak you identify yourself so our
10:04:39 3 record is clear. Okay?

10:06:45 4 (The judge entered the conference room.)

10:06:45 5 THE COURT: Good morning, counsel. This is Judge
10:06:50 6 Richard Jones in the matter of T-Mobile v. Huawei Device,
10:06:56 7 Inc., et al. Cause number C-14-1351-RAJ. Would the parties
10:07:03 8 please identify themselves?

10:07:07 9 MR. HUESTON: Good morning, Your Honor. John
10:07:10 10 Hueston, Alison Plessman and Steve Feldman on behalf of
10:07:14 11 T-Mobile.

10:07:17 12 THE COURT: All right.

10:07:17 13 MR. HIBEY: Good morning, Your Honor. My name is
10:07:20 14 James Hibey. I represent the defendants in the case. And
10:07:23 15 along with me on other phones in other locations are Tim
10:07:28 16 Bickham and Mike Flynn-O'Brien. I believe our counsel in
10:07:35 17 Washington, Frank Cordell, might be on the line as well.

10:07:39 18 MR. CORDELL: Yes, I am.

10:07:41 19 THE COURT: And who will be the speaking parties for
10:07:44 20 the plaintiff? Is it Mr. Hueston?

10:07:47 21 MR. HUESTON: It will be three of us, depending on
10:07:49 22 which motion is discussed, Your Honor. It is John Hueston,
10:07:53 23 myself, Alison Plessman, or Steve Feldman, depending on the
10:07:58 24 motions.

10:07:59 25 THE COURT: And who is going to be speaking on behalf

1 of the defendants?

2 MR. HIBEY: Your Honor, Jim Hibey. I'm prepared to
3 address all four motions. If necessary, and with the court's
4 permission, Mr. Bickham or Mr. Flynn-O'Brien may have to
5 chime in on a fact or two.

6 THE COURT: Okay. All right, counsel, this is what
7 the court is going to do. I'm not sure what your
8 expectations were, but I thought because of the locations of
9 individuals that it would be more expeditious for the parties
10 for the court to bring the parties together in this fashion.
11 My game plan today is to go through and give you my rulings,
12 tentative rulings at this point. You've had more than an
13 abundance of opportunity to brief this case. And some of the
14 motions start to be repetitive in terms of the arguments that
15 are made and the cases that have been cited to advance your
16 positions to the court. And so I don't know that extensive
17 oral argument is going to be necessary.

18 So I'm going to start with the motions the parties have.
19 I'll address each of the motions. And then I'll take any
20 comment or answer any questions that the parties may have if
21 you need further clarification.

22 We're not going to give you a detailed written order. I'm
23 going to provide as much detail as possible in the court's
24 oral determinations. And then what you can expect at the
25 conclusion will be basically a minute order or a very brief

1 order that just confirms the actual determinations made by
2 the court.

3 So with that we'll begin with -- and what's the correct
4 pronunciation of the defendant's name?

5 MR. HIBEY: It's Huawei.

6 THE COURT: Huawei. Okay. Thank you, counsel.

7 I'll begin with Huawei's motion for sanctions, that's
8 Docket No. 130, and the supplemental briefs, Docket No. 149.

9 Now, these two motions request terminating sanctions in
10 response to T-Mobile's late or claimed incomplete disclosures
11 of two documents. That's, one, the partial image or working
12 copy of a T-Mobile laboratory computer; and, two, certain
13 documents such as laboratory access logs, computer logs, and
14 badge entry logs that have been withheld.

15 Now, my initial observation is that when you begin your
16 request by asking for the most severe sanction that can be
17 possibly awarded by the court, the likelihood of success on
18 that type of request isn't great.

19 I'll also note that a terminating sanction, whether it's a
20 default judgment against a defendant or dismissal of a
21 plaintiff, is very severe. And all the cases talk about the
22 severity of the type of sanction being requested. Now,
23 generally speaking, only willfulness, bad faith, or fault
24 justify terminating sanctions.

25 Now, it's undisputed that T-Mobile had a copy of the 2013

1 partial image since June 2013. The request for inspection
2 relevant to this image was propounded in September 2015. My
3 review indicates that T-Mobile responded to this request on
4 October 8, 2015, and appears to have offered to make the
5 actual robot and image available on November 20, 2015.
6 Apparently Huawei was not available, but they did not try to
7 reschedule until April 2016.

8 Now, I'm not satisfied that T-Mobile has delayed in
9 producing the partial image as claimed. The court also notes
10 that Huawei has not sufficiently shown that the partial image
11 fell under another discovery request. T-Mobile produced the
12 partial image essentially around the time the parties finally
13 agreed to a laboratory inspection. That's the time in which
14 Huawei could have scheduled the same event earlier.

15 Now, we have another problem that still exists. T-Mobile
16 admits that it lost the physical image, that's a complete
17 copy of the June 2013 computer hard drive. Apparently there
18 was some issue regarding how it was plugged in and a worn
19 power connector of some sort.

20 Now, there's some evidence that the partial image that was
21 ultimately produced to Huawei is incomplete, especially as
22 compared to the physical image.

23 Now, in this regard or in response, Huawei has argued
24 spoliation. Now, on the surface it appears that the
25 defendant is correct, that T-Mobile failed to preserve this

1 information. But terminating sanctions for spoliation
2 generally requires a showing of some degree of willfulness,
3 bad faith, or fault. And the court does not find that this
4 has been demonstrated.

5 The court also notes that terminating sanctions are
6 available for lost electronically-stored information, only
7 upon the finding that the party acted with intent to deprive
8 another party of the information's use.

9 Again, dismissal is authorized only in extreme
10 circumstances and only when the violation is due to
11 willfulness, bad faith, or fault of the party. And the
12 defendant has not shown this.

13 Now, at best, this really comes down to a question of, if
14 it wasn't willfulness, then I have to address the question of
15 delay, because that appears to be the more prevalent issue.
16 Now, it's apparent to this court that T-Mobile delayed for
17 nearly two years in disclosing the specific existence or
18 destruction of the logical images. Now, the court doesn't
19 condone or support that that was appropriate. T-Mobile knew
20 that it was lost. T-Mobile knew that there was litigation.
21 And clearly, in good faith, should have exercised the proper
22 discretion and produced or shared this information with the
23 defense.

24 Now, some of the delay may have been justified, and much
25 of it may not. But whatever the case, terminating sanctions

1 are too severe and not appropriate, based upon the record
2 that has been presented to this court.

3 Now, Huawei also requests terminating sanctions for the
4 late disclosure of certain documents. Now, these documents
5 include Internet access logs, computer audit trails, badge
6 access logs, and the physical sign-in and sign-out logs for
7 one of the robot testing chambers. The court finds, as other
8 courts, that delay alone is insufficient prejudice to justify
9 terminating sanctions.

10 Now, I think that in the truest of hearts the defendants
11 recognize this and that's the reason why they filed its
12 supplemental briefing adding additional evidence. And,
13 again, further arguing spoliation.

14 And in that briefing Huawei gave the court the theory that
15 it was deprived of the ability to conduct some investigation
16 and discover exculpatory evidence. It also argued that
17 T-Mobile likely did not follow best practices in preserving
18 the physical drive.

19 Now, T-Mobile has countered and disputes these
20 contentions, and it argues that the logical image actually
21 contains some of the information that Huawei contends it was
22 deprived of. Bottom line, the court finds there was
23 insufficient evidence to show intentional spoliation of
24 evidence. The evidence suggests that the destruction was
25 inadvertent.

1 Now, again, this is based upon the records and facts as
2 presented to the court. The court also notes that the
3 information didn't necessarily deprive Huawei of much of the
4 evidence Huawei originally indicated it could not discover.
5 The only evidence as far as the court can determine that
6 Huawei no longer had access to is, one, evidence from other
7 user files; and, two, temporary file data.

8 Bottom line, the court finds that Huawei has not been
9 deprived of any critical information and neither of the two
10 bases supplied for this court constitute significant
11 deprivation to warrant the relief sought by the defendant.

12 The court also notes that there's case authority that
13 clearly indicates that there is no duty to preserve temporary
14 files until they have been specifically requested. The court
15 also notes there's no duty to preserve temporary files where
16 parties were only under a general litigation hold. The
17 physical image here was lost before this litigation began,
18 but it was certainly while T-Mobile was under a general duty
19 to preserve.

20 Now, on the other hand the other user profiles presents a
21 compounded additional challenge, because here it could be
22 helpful in showing whether Huawei's conduct deviated from
23 other manufacturers with access to the robot computer.

24 Huawei argues that T-Mobile must be sanctioned because
25 Huawei can't rely on this information any longer. Now, the

10:17:36 1 court doesn't necessarily disagree with that, but the problem
10:17:40 2 and the challenge I have is that Huawei has failed to explain
10:17:43 3 how this information really matters or why it is unable to
10:17:47 4 obtain similar information through other means. In other
10:17:51 5 words, it has received evidence of source code changes and
10:17:54 6 access to the robot computer in the interim.

10:17:57 7 Huawei's accusations of delay present another challenge.
10:18:03 8 Now, there's no question or at least little question that
10:18:07 9 T-Mobile should have known that potentially relevant
10:18:09 10 information was destroyed before the litigation began, and
10:18:12 11 I've already indicated that. But Huawei's accusations that
10:18:16 12 T-Mobile has consciously attempted to cover the incident up,
10:18:21 13 in this court's opinion, it believes that that goes too far,
10:18:25 14 because part of the delay in inspecting the testing robot and
10:18:29 15 related computer information is directly attributed to the
10:18:32 16 conduct of Huawei.

10:18:34 17 Consequently, there's enough blame to go around on this
10:18:38 18 dispute, and the court is not satisfied, based upon the
10:18:42 19 record made, that it warrants further determinations as
10:18:46 20 requested.

10:18:46 21 Now, there's another issue that Huawei appears at times to
10:18:52 22 request a lesser sanction. There's no evidence that T-Mobile
10:18:56 23 intentionally destroyed the information or explanation of how
10:19:00 24 this evidence would help Huawei. And based upon the lack of
10:19:01 25 evidence or lack of sufficient information, the court can't

1 grant that request. Therefore, the court will deny the
2 motion for sanctions as proposed.

3 The court will grant the motion for leave to file a
4 supplemental brief. And the bottom line is that the briefs
5 that were filed, the court has considered all of them as
6 they've been presented. So I just wanted to make a formal
7 record that I have granted the leave to file a supplemental
8 brief.

9 I'd also noted, along these lines, the key documents that
10 Huawei complains about were ultimately produced. And I would
11 also note that if they believe that they didn't have enough
12 time to analyze all these documents, the simple recourse
13 would have been to request additional time for expert and
14 factual discovery. There's no question that the parties
15 clearly understand that when you don't have what you need,
16 you know how to come to court and ask for it.

17 The court also notes that the physical image presents a
18 problem in so far as Huawei is unable to compare its conduct
19 with those of other manufacturers. Now, the difficulty with
20 sanctioning this loss is Huawei has not shown why it is
21 unable to make use of data currently on the robot computer to
22 do such a comparison; and, two, how other manufacturers' user
23 activity would actually bolster their claims of innocence.

24 Now, please don't read into this as an invitation for
25 additional briefing. When the court makes its ruling the

1 court is satisfied that this is a correct and proper ruling
2 and is a final say and determination on this. Now,
3 T-Mobile's delay is regrettable, but ultimately it's not
4 going to be sanctioned by this court by way of the relief
5 sought by the defense.

6 Now, we'll transition to T-Mobile's motion to compel.
7 That's Docket Nos. 132 and 138. And T-Mobile seeks five
8 categories of documents or things, and I'll go through them
9 in the order as follows:

10 First we'll start with the sales and return data. Now,
11 T-Mobile is requesting information about the sales of
12 Huawei's devices and consumer returns of the products.
13 Huawei claims that it has produced all of this data or that
14 T-Mobile has failed to meet and confer on these issues. And
15 T-Mobile has countered that it has yet to receive the
16 relevant documents or information.

17 Now, if the court takes T-Mobile's representations as
18 accurate, it's probably correct that Huawei has not fully
19 complied with its discovery obligations. If the
20 Bates-numbered files that Huawei has been directing them to
21 have not revealed the sought-after information, then it was
22 either not produced or Huawei has not complied with its
23 obligations to specifically identify the records that
24 actually contained this information. Regardless, or whatever
25 the case, the evidence is relevant and should be produced,

1 and the court will grant this motion.

2 Next is the TMSS issue. Huawei's central testing server
3 is the TMSS. Now, both parties have made their attempts to
4 try and describe the enormity and size of what this TMSS
5 platform includes. Now, the summary that I have is it
6 contains over 1 billion files, that there are nearly
7 24 million of those related to software testing, and almost
8 2 million related to hardware testing. The testing robots
9 identified by T-Mobile, according to the materials and
10 documents submitted by the parties, apparently have never
11 been connected to TMSS, although they have log-in screens for
12 TMSS.

13 Based upon what Huawei has proffered, I'm not even sure if
14 TMSS's circumstances or information is relevant to this case.
15 If it was never connected to any robotic device tester, I'm
16 not clear how T-Mobile's trade secrets were incorporated into
17 it.

18 Now, I agree with Huawei that even if TMSS is relevant to
19 the case, further discovery is inappropriate at this time.
20 T-Mobile appears to have discovered the existence of TMSS in
21 December 2015. It appears to the court that T-Mobile does
22 not appear to have investigated TMSS in the interim, and this
23 motion was brought on the eve of the discovery cutoff. Now,
24 delay in bringing this motion to compel may justify its
25 denial, just based upon that fact alone.

1 The other question the court has is whether discovery of
2 the sought-after discovery is proportional to the needs of
3 the case. Now, I want the parties to understand the context
4 of the request. If there are a billion files at issue, I'm
5 not sure how, with a team of lawyers, or scores of lawyers,
6 between today's date and the time set for trial, that any
7 rational person could argue that you'd have time to analyze
8 the data, particularly if the data would come to you in the
9 form of a matter that needed to be translated to some degree.

10 Trial in this matter is set for October 31, 2016. It
11 appears to the court that the parties should be or are in the
12 middle of completing expert depositions. The additional
13 discovery of potentially billions or at least millions of
14 additional files is certainly going to lead to another
15 continuance in this long-running case.

16 Now, if I granted the request, I'm confident that there
17 would be a request for an extended delay and there would be
18 some projections or proposals about your approach to
19 discovering the information, and there would be motions
20 requesting the opening of further discovery because of this
21 information that you believe might potentially have more
22 information to help the case along.

23 Going into the TMSS appears to be closer to the concept of
24 scorched-earth discovery as opposed to pursuing something
25 reasonably calculated to lead to discovery of admissible

1 evidence. And it's for these reasons I will deny T-Mobile's
2 request to compel production of TMSS information.

3 Next is the issue regarding other robots. T-Mobile is
4 requesting the court to compel Huawei to permit inspection of
5 Huawei's additional testing robots. T-Mobile also requests
6 the source code or software for those robots, specifically
7 OptoFidelity -- and I'll spell that for the court reporter,
8 O-P-T-O, F-I-D-I-L-I-T-Y -- and Putian, P-U-T-I-A-N. And
9 these are systems that are ostensibly from third parties.

10 Now, Huawei objects, contending that T-Mobile relies on
11 the wrong discovery requests or that such discovery is
12 duplicative or unduly burdensome. The court disagrees with
13 Huawei's contentions on this point. Huawei has not given
14 T-Mobile access to the control software for the OptoFidelity
15 and Putian robots. Conceivably Huawei could have
16 misappropriated T-Mobile's trade secrets if it incorporated
17 those secrets into those testing platforms. So the court
18 will grant the motion to compel another inspection of these
19 third-party robots, along with their accompanying source code
20 or software.

21 Next, test cases, scripts and sequence files. T-Mobile
22 requests compulsion of certain sequence files associated with
23 the testing robots. T-Mobile claims that the only sequence
24 files made available relate to the XDeviceRobot, not to the
25 other testing robots. Now, Huawei admits that it never

1 produced this data for non-XDeviceRobot testers.

2 In the court's view, T-Mobile is entitled to this
3 information, but only for the other robots identified in the
4 request.

5 Next we'll transition to Huawei's motion to compel, Docket
6 No. 134. Some of the issues have been mooted by further
7 productions or agreements between the parties, but Huawei
8 still insists upon compulsion of, one, a 30(b)(6) witness on
9 T-Mobile's communication with third parties relating to the
10 lawsuit, topic No. 30; and number two, Interrogatories Nos.
11 2, 7, 8 and 9.

12 Let's look now at the deposition, topic No. 30. It's a
13 request or calls for all communications with third parties,
14 including but not limited to OptoFidelity and Deutsche,
15 D-E-U-T-S-C-H-E, Telekom, T-E-L-E-K-O-M, AG, related to this
16 action or any of the underlying actions.

17 Now, T-Mobile contends that the topic is overbroad because
18 Huawei has not confined the inquiry to specific third parties
19 other than OptoFidelity and Deutsche Telekom.

20 The court disagrees with T-Mobile. The communication they
21 point to does not reflect that T-Mobile ever disclosed the
22 identities of third parties it discussed litigation with.
23 Once they have disclosed that information, they would be
24 entitled to raise relevance concerns.

25 Now, on the other hand, T-Mobile appears to argue that

1 Huawei has already had the opportunity to explore T-Mobile's
2 communications with OptoFidelity. And it's inadequate
3 justification, simply because individual deponents have
4 already testified about the topics noticed in the
5 Rule 30(b)(6) deposition notice, it doesn't preclude
6 continued examination.

7 Now, T-Mobile argues that its communications with Deutsche
8 Telekom are irrelevant. Now, I don't really understand that
9 objection. The deposition topic isn't asking for Deutsche
10 Telekom's view of the case, it's asking for what information
11 was disclosed between T-Mobile and third parties.

12 Therefore the court orders that T-Mobile is to designate a
13 30(b)(6) witness to testify as to T-Mobile's communications
14 with OptoFidelity and Deutsche Telekom regarding the subject
15 matter of this case; and, two, to disclose the identities of
16 any other third parties they communicated with regarding the
17 subject matter of this case.

18 The court also directs that the parties should meet and
19 confer to discuss whether an additional 30(b)(6) witness is
20 necessary.

21 And, counsel, when I direct the parties to meet and
22 confer, there's a lot of engagement that goes back and forth,
23 and I'm not sure if it's really good-faith effort on the
24 parties to really sincerely meet and confer in a civil
25 fashion towards resolving the conflict, short of filing a

1 motion with this court. So when I direct the parties to meet
2 and confer, I direct with a genuine approach in trying to
3 resolve the differences without having to ask for court
4 intervention.

5 We'll next go to Interrogatory No. 2. This is a request
6 of a detailed description of the development of the trade
7 secrets that Huawei allegedly misappropriated. But the
8 response simply directs Huawei to two expert reports and
9 5,000 pages of documents. In the court's opinion and
10 conclusion, that's not a responsive answer. T-Mobile
11 obviously knows much more about the development of its trade
12 secrets than Huawei. The court therefore orders that
13 T-Mobile should and shall supplement this response.

14 The next is Interrogatory No. 7. This interrogatory
15 requests the identities of each person involved in T-Mobile's
16 decision to end its supplier relationship with Huawei.
17 T-Mobile's response is deficient. Now, Mr. Rossi apparently
18 identifies some of the individuals involved. He does not
19 identify all of them. And, in fact, he even admits that he
20 did not recall all of the names of the folks involved at all
21 points in time. That's insufficient. The court, therefore,
22 orders that the response shall be supplemented.

23 Next is Interrogatory No. 8. This requests that T-Mobile
24 describe the facts that support its claim for damages,
25 including each category of substantial costs identified in

1 the complaint as well as the identity of persons with
2 knowledge of these damages.

3 Again, T-Mobile's supplemental response directs Huawei to
4 the expert report of Ryan Sullivan, Ph.D. This response
5 should be supplemented. The court finds that that response
6 is inadequate.

7 Next, Interrogatory No. 9 requests an explanation for
8 every denied request for admission. Now, my review indicates
9 that T-Mobile responded for only 17 requests for admission,
10 contending that each other separate request constituted a
11 separate interrogatory.

12 Now, as for the 17 requests for which there were
13 responses, T-Mobile simply provided identical responses,
14 referring Huawei to an expert report, T-Mobile's initial
15 disclosures, depositions and expert reports. Again, the
16 court agrees with Huawei, that is improper and insufficient
17 and must be cured.

18 Now, Huawei does not appear to request any responses
19 beyond these 17, so only those responses shall be
20 supplemented and so ordered by this court.

21 Next is Docket No. 179. This is T-Mobile's motion to
22 compel. In this motion T-Mobile is seeking documents that
23 Huawei has clawed back through the parties' confidentiality
24 agreement. Now, at the outset the parties argue over the
25 admissibility of the evidence, under Federal Rule of Evidence

10:34:24 1 408. Bottom line, the court concludes that the issue of
10:34:30 2 admissibility is not proper at this time. Now, that may come
10:34:33 3 up some other time, either in a motion in limine or some
10:34:37 4 other purpose, but at this point in time that's not the
10:34:42 5 dictating factor. Rule 408 does not effectively affect the
10:34:47 6 discoverability of settlement discussions.

10:34:50 7 Now, in this motion the waiver issue is also of
10:34:57 8 significant concern to this court. Now, before filing this
10:35:02 9 lawsuit Huawei shared some information about its internal
10:35:06 10 investigation with T-Mobile's investigations unit. Now, this
10:35:10 11 information apparently included a copy of Huawei's internal
10:35:13 12 investigation report, among other things. Huawei has since
10:35:17 13 asserted attorney-client and work-product privilege for the
10:35:22 14 details of Huawei's internal investigation.

10:35:26 15 Somewhere in the process Huawei produced 22 documents out
10:35:30 16 of -- I believe the number was 375,000, and that it has now
10:35:35 17 attempted to claw back under the stipulated confidentiality
10:35:38 18 agreement.

10:35:38 19 Now, half of those documents or half of those e-mails
10:35:44 20 between T-Mobile and Huawei discuss the results of Huawei's
10:35:48 21 internal investigation and answer a few questions about the
10:35:51 22 investigation. Under these circumstances there's little
10:35:55 23 basis for finding that communications shared with third
10:35:57 24 parties are no longer privileged.

10:36:01 25 The others, however, are e-mails that do not have a

10:36:04 1 third-party addressee. T-Mobile raises serious concerns
10:36:08 2 about whether they are actually internal communications.
10:36:11 3 However, T-Mobile appears to argue that these internal
10:36:16 4 communications are actually identical to communications
10:36:19 5 between Huawei and T-Mobile. The problem the court has is
10:36:23 6 that Huawei hasn't filed these communications in camera, so
10:36:27 7 it's impossible for the court to tell.

10:36:30 8 So for these communications the court will order Huawei to
10:36:34 9 present them to the court in camera so that the court can
10:36:37 10 make its own determination that privilege has actually been
10:36:41 11 waived.

10:36:41 12 And, finally, T-Mobile argues that not only has Huawei
10:36:45 13 waived any privilege to these 22 documents, but that it has
10:36:49 14 waived privilege as to the entire subject of Huawei's
10:36:52 15 internal investigation.

10:36:55 16 The Ninth Circuit has construed the scope of such waiver
10:36:58 17 to be very narrow and extremely narrow. In evaluating what
10:37:03 18 constitutes the subject matter of a waiver, courts are
10:37:07 19 instructed to weigh the circumstances of the disclosure, the
10:37:10 20 nature of the legal advice sought, and the prejudice to the
10:37:13 21 parties in permitting or prohibiting further disclosures.
10:37:18 22 With this in mind, I will narrowly construe the waiver.

10:37:23 23 The documents that have been presented to the court show
10:37:25 24 limited disclosure of the results and findings of the
10:37:27 25 internal investigation. These communications do not reveal

1 the legal advice given to Huawei. For the most part they
2 simply reflect factual findings and conclusions that Huawei
3 reached.

4 The apparent purpose of the disclosure was to facilitate
5 resuming of the business relationship between T-Mobile and
6 Huawei. In other words, settlement-type or pre-dispute
7 discussions. The bottom line is, the court will deny any
8 finding that Huawei has waived its privilege as to its entire
9 investigation.

10 The last are the different motions to seal, and that's
11 Docket Nos. 136, 163, 183 and 190. None of these motions are
12 dispositive, so the parties simply have to show good cause to
13 seal. Now, from my review it appears that the documents
14 involve, one, Huawei's detailed and confidential financial or
15 internal company development information that may be
16 commercially sensitive; and, two, sensitive business
17 information such as descriptions of its internal process for
18 selecting products; three, internal human business operations
19 processes and technical information; and, four, information
20 about Huawei's internal investigation.

21 Based upon these submissions to the court, and the
22 representations made by the parties, the court agrees that
23 these documents are sensitive, contain sensitive information,
24 and warrant the court's protection. So they may be filed
25 under seal. The court, therefore, finds that the parties

1 have established good cause.

2 So with that, counsel, I think the court has clearly laid
3 out its determinations of the variety of motions. And I
4 believe the court is current with any outstanding motions
5 that are before this court at this point in time.

6 So, if the parties wish to make any additional record or
7 ask for any clarifications. And, counsel, on the in camera
8 submission I'm going to give you seven business days. So
9 today's date is the 28th, so seven business days from that,
10 I'll expect that production to be made.

11 So, on behalf of plaintiff, are there any issues or any
12 clarifications that need to be made?

13 MR. HUESTON: Your Honor, it's John Hueston. And
14 with respect to the motions for sanctions, we're prepared to
15 submit on the court's tentative, depending on -- I may have a
16 comment, responding comment if Mr. Hibey wishes to address
17 that. I'm going to turn it over to my colleagues for
18 follow-up on the other motions.

19 THE COURT: Okay. And please identify yourself
20 before you speak.

21 MS. PLESSMAN: Good morning, Your Honor. This is
22 Alison Plessman. I wanted to briefly address T-Mobile's
23 motion to compel. One particular issue that we'd like
24 clarification on is the test cases, sequence files and
25 script. I believe you ordered that those -- that that

1 software information should be produced for the additional
2 robots, but I wanted to make clear that our position is that
3 information has also not been provided for the XDeviceRobot.
4 Huawei claimed in their opposition that it has, in fact, been
5 produced. But we have followed up, it's been two months.
6 They still haven't identified, by Bates number or any other
7 manner, where those files may be. And so we would like to
8 just have the court's order make clear that that information
9 should also be produced for the XDeviceRobot. And if Huawei
10 believes it has, in fact, been produced, that they should
11 have to identify that by Bates number.

12 THE COURT: Okay. Thank you.

13 MR. HIBEY: Your Honor, this is Jim Hibey. Should I
14 respond?

15 THE COURT: No. Let me hear any issues raised by
16 plaintiffs to anything that was said by the court, so then
17 when you respond it's a global response as opposed to one at
18 a time. So anything further from the plaintiffs?

19 MS. PLESSMAN: Just one additional point on Huawei's
20 motion to compel. With respect to topic No. 30, I think our
21 primary issue was trying to, as a practical matter, determine
22 how we would interview thousands of employees to determine
23 whether anybody spoke to third parties about the lawsuit and
24 how we would prepare a witness to testify regarding those
25 communications.

1 One compromise that we offered to Huawei was to limit the
2 third-party communications that would be inquired about to
3 the documents that have been produced in this case already,
4 which were produced after a diligent search on topics that
5 should be relevant in any way to this case. So we would ask
6 the court to consider limiting that deposition to questioning
7 on documents relating to that topic.

8 THE COURT: Okay. Does that cover it for plaintiffs?

9 MR. FELDMAN: This is Steve Feldman of Hueston
10 Hennigan. I would like to briefly address the motion to
11 compel the investigatory documents.

12 THE COURT: Okay. And which docket number is that,
13 counsel?

14 MR. FELDMAN: 179, I believe.

15 THE COURT: Okay.

16 MR. FELDMAN: So I understand that Your Honor is
17 going to be looking at the documents that are submitted in
18 camera by Huawei.

19 THE COURT: Right.

20 MR. FELDMAN: And we appreciate that and think that
21 that will shed some additional light on the issue of not just
22 waiver of specific documents, but of the broader subject
23 matter waiver.

24 I understand the court's belief that based on the evidence
25 it's seen, it doesn't believe there's a subject-matter waiver

1 here. But we would just ask that when these additional
2 numerous documents are reviewed, that Huawei has never
3 submitted, that the court give consideration to whether that
4 actually would change the analysis.

5 THE COURT: Counsel, if you could give me context in
6 terms of what kind of volume are we talking about with these
7 documents?

8 MR. FELDMAN: Well, our understanding is that --
9 well, virtually all of the 22 documents have not been
10 provided. There were about six or seven, I believe, that we
11 had separate versions of that we then submitted under seal to
12 this court, which you were able to review. But I believe
13 Huawei will be submitting ten-plus additional documents that
14 were clawed back. And so T-Mobile isn't in possession of
15 those, because we, in compliance with the protective order,
16 went ahead and immediately destroyed them.

17 THE COURT: All right.

18 MR. FELDMAN: And the final point, just to make on
19 this motion to compel investigatory documents, is while there
20 is this issue of waiver of privilege and of the broader
21 subject-matter waiver, there is this other subset of
22 documents. And I believe Your Honor referenced them, but I
23 just wanted to clarify those, which is there are a series of
24 documents here where we are not asserting that there was a
25 waiver, but that, in fact, these documents were never

1 privileged in the first place.

2 And so as a result a claw back would be improper because
3 to be clawed back under the parties' agreement, there must
4 have been an inadvertent disclosure of privileged material.
5 And a number of these documents, some of which were
6 submitted, but we believe a number of additional ones which
7 you'll see when Huawei provides them in camera, are simply
8 e-mails between a non-lawyer at Huawei and non-lawyers at
9 third-party T-Mobile a year before the litigation even
10 commenced, talking about the incident. And that's about it.
11 There is no indication of privilege anywhere in the e-mail.
12 And there was never any assertion of privilege. In fact, in
13 one of those e-mails which we submitted, it was actually
14 redacted by Huawei for privilege on a couple of points, but
15 not on the rest, I think clearly showing that even they
16 didn't believe it was privileged.

17 And so we would just urge the court, with respect to those
18 documents, to consider a ruling that those should be returned
19 to T-Mobile and that they be part of the discovery in this
20 case, given that they were never actually privileged in the
21 first place.

22 THE COURT: Okay. And may I take your representation
23 that that was the last word from the plaintiff?

24 MR. FELDMAN: If Mr. Hueston and Ms. Plessman agree,
25 then yes, certainly from me.

10:46:30 1 MR. HUESTON: Yes, Your Honor.

10:46:31 2 THE COURT: All right, then. Let's hear from counsel
10:46:37 3 for the defense.

10:46:39 4 MR. HIBEY: Thank you, Your Honor. It's Jim Hibey
10:46:42 5 for the defendants. I think I would like, if the court is
10:46:47 6 okay with it, to go in reverse order, since it's what I just
10:46:51 7 last heard.

10:46:52 8 THE COURT: That's fine.

10:46:53 9 MR. HIBEY: With respect to the documents that were
10:46:55 10 clawed back, they are either work product or attorney-client
10:47:01 11 privilege documents. There is no intent on the part of
10:47:04 12 Huawei to use them in this litigation, so the sword/shield
10:47:10 13 argument that they made and would like, I assume, you to
10:47:14 14 consider when Mr. Feldman says we want you to reconsider your
10:47:19 15 waiver decision, there is no sword/shield use here.

10:47:25 16 And equally important, perhaps even more importantly,
10:47:29 17 after we clawed back the documents, T-Mobile produced all of
10:47:34 18 the same documents in this litigation. So they are in the
10:47:39 19 record. And so the issue that remains is the court
10:47:43 20 recognized, when it was providing its ruling, is that there
10:47:47 21 will be an issue either in limine or in court at trial with
10:47:54 22 respect to the admissibility.

10:47:56 23 All of that, all of those documents were shared with
10:48:00 24 T-Mobile under 408. And we're happy to provide the court
10:48:07 25 with the 22 documents or so, however many there are, and ask

10:48:13 1 that you not reconsider given what I've just said.

10:48:15 2 Moving to the motion to compel that Ms. Plessman addressed
10:48:25 3 and the 30(b)(6) witness, with respect to Opto, and I think
10:48:31 4 she was really concerned about Deutsche Telekom or others.
10:48:35 5 It's remarkable to hear today that they're concerned about
10:48:38 6 thousands of people within their company to interview, to
10:48:44 7 discuss, or to find out whether they discussed third-party
10:48:49 8 communications about the allegations in this case. If they
10:48:54 9 did, then we are entitled to know all of that.

10:49:00 10 But it would be shocking to me, though I think they just
10:49:04 11 said it, it would be shocking to me that they had lots of
10:49:09 12 conversations with lots of different vendors or companies or
10:49:12 13 entities about the allegations in this lawsuit. If they did,
10:49:19 14 then according I believe to Your Honor's ruling, your
10:49:24 15 tentative ruling at least, they best disclose that and give
10:49:29 16 us an opportunity to know who they are and what those
10:49:32 17 communications were.

10:49:33 18 With respect to --

10:49:36 19 THE COURT: Counsel, one of the proposals that
10:49:38 20 counsel made was to limit it to the documents they actually
10:49:44 21 produced, as a friendly proposal at limiting the scope. What
10:49:51 22 is your reaction to that?

10:49:54 23 MR. HIBEY: They produced virtually nothing with
10:49:56 24 respect to that issue. So I don't accept their supposed
10:50:00 25 proposal or compromise. If their people had conversations

1 with third parties, including Deutsche Telekom and Opto about
2 the allegations in the lawsuit, then we're entitled to know
3 who and what they said to them. That would be our position.

4 With respect to the motion to compel and Ms. Plessman's
5 comments about XDR or XDeviceRobot as opposed to Opto and
6 Putian, there are two responses, actually, Your Honor, that
7 are pretty straightforward. We have given them the test
8 cases and the scripts. All they have to do is run a search
9 with the words "test case" and they'll find them, they'll get
10 them. It's beyond me why we have to do their work for them.

11 Secondly, the documents upon which or to which we're
12 referring right now, they're in our expert report. So
13 perhaps if they took -- some of those documents were in the
14 expert report, relied upon in our expert report. So if they
15 take the time to go back through that they'll see what we're
16 talking about.

17 I need to come back on a logistical matter, the court's
18 ruling on the Opto and Putian robots, but I want to first,
19 before I do that, because it's a logistical matter, I would
20 like to say something about our motion for sanctions.
21 Obviously I understand the court's ruling. I understand that
22 it was a severe sanction, that it is a terminating sanction
23 that we requested. But the conduct merited it.

24 We also said, as an alternative, that they should be
25 prevented from using the documents that come off that

1 computer or come off that FTK, that forensic tool kit image,
2 which is a partial image.

3 And the reason we think this is so significant, the reason
4 we think this is so important and the reason we think this
5 conduct is so egregious is because they sat on that
6 information until -- and let me flip a note here if I can to
7 my chronology -- the first time they ever disclosed the
8 existence of that FTK image was April 18, 2016.

9 And then when we tried thereafter to try to talk to them
10 about what's that mean, even, the answer we got was: Your
11 inspection will answer most of your questions. That's when
12 we went and did the inspection on May the 4th. That's when
13 we stopped it because my colleague, Mr. Flynn-O'Brien, as he
14 was going through the computer and the FTK image, saw that
15 there were documents that were marked privileged. So he
16 stopped. Though he saw -- before he saw those privileged
17 documents -- documents that are clearly relevant to this
18 case. They produced some of them, yes, since then. Since
19 then. They produced them on May the 13th, after we filed
20 this motion for sanctions.

21 Discovery closed on May the 18th, having been extended
22 from May the 4th. And on May the 23rd, that is the first
23 time we were ever told, ever knew, ever had any way of
24 knowing that the full image had been destroyed and that only
25 a partial image remained.

1 The egregious conduct here is the fact that they sat on
2 this information for more than three years. That's why we
3 asked for such severe sanctions, understanding that it is
4 difficult to convince a court for terminating sanctions. But
5 at a minimum they should be penalized for their conduct.
6 They cannot be rewarded for sitting on information that they
7 had in their possession, and that was directly relevant to
8 this case, since June of 2013. We come upon it in April and
9 then in May, still even a month later, before they tell us
10 that it's just a partial image.

11 Now they're in a position to use whatever they want to use
12 off of that image or off of that computer. And we, quite
13 frankly, can't. We have documents that haven't been
14 analyzed. And we're in a position now where we don't know
15 what was destroyed. None of us on this call can say what was
16 destroyed. And why is it important? Because it had
17 contemporaneous documentation of the alleged misuse of TMO's
18 robot. It had things like Internet and file-access activity,
19 user profiles, applications.

20 All of that is important for a couple of reasons at least.
21 One, and I think Your Honor alluded to it, whether or not the
22 other OEMs were acting consistently or whether we, more
23 importantly, were acting consistently with them. Course of
24 conduct. Pattern. Practice.

25 The second reason is it goes to the issue as to whether

10:56:14 1 these things, whatever they can identify as a trade secret,
10:56:19 2 are actually trade secrets, because one of the issues in the
10:56:26 3 case is to what extent, to what measures did they go to
10:56:29 4 protect their so-called trade secrets? There likely is
10:56:34 5 information with respect to the other OEMs, even with respect
10:56:38 6 to us in this, the materials that were destroyed and lost,
10:56:44 7 with respect to those issues.

10:56:48 8 And I understand it looks like if Mr. Corey Riel, who they
10:56:52 9 identified in a May 23, 2016 filing, if this is all a
10:57:00 10 mistake, so be it, it was a mistake. But nonetheless, it was
10:57:03 11 a mistake they sat on for over three years. That's why we
10:57:09 12 think, at a minimum, at a very minimum they should be
10:57:12 13 penalized and should not be allowed to use the information
10:57:16 14 off the image or off that computer.

10:57:18 15 I think that's all I have at this point, Your Honor.

10:57:27 16 THE COURT: Okay.

10:57:30 17 MR. HIBEY: Except I have a logistical issue at the
10:57:33 18 very end.

10:57:33 19 THE COURT: Let's talk about it now, then.

10:57:35 20 MR. HIBEY: It has to do, then, with the inspection
10:57:42 21 of the Opto and Putian robots. This means everybody is going
10:57:47 22 back to China for a third time to do this at this point.
10:57:53 23 This isn't something that can be done overnight. And if I
10:57:56 24 understood Your Honor's ruling, we have to somehow -- or not
10:58:02 25 somehow -- but we have to provide them with source codes and

1 test cases with respect to those two robots. If that's going
2 to happen we're going to end up adjusting the dates for the
3 technical expert reports. I assume there will be
4 supplements. There are depositions scheduled that are going
5 to have to be put off. Summary judgment is supposed to be
6 filed on August 2nd, and we have been preparing to do that.
7 But now if there's going to be more information and more
8 discovery, I guess what I'm saying is it doesn't make sense.
9 Otherwise Your Honor is going to be inundated with motions
10 and then supplemental motions, et cetera, et cetera. This is
11 going to delay matters.

12 THE COURT: Well, counsel, I fully expect that
13 there's going to be -- just one second -- I fully expect,
14 counsel, that the nature of the court's rulings were going to
15 necessitate some ongoing discussions with counsel. And I
16 also fully expected that this was going to require, more
17 probably than not, an additional trip for the parties. But,
18 again, this isn't at the court's doing, it's the manner in
19 which this case has been litigated. The parties certainly
20 have the opportunity to, again, with emphasis, meet and
21 confer to deal with some of the logistical problems the
22 parties have identified.

23 We've got a trial date, and the trial date is coming up
24 quite quick and quite fast. There's a tremendous amount of
25 work that needs to be done. And when you use the word

1 "inundated," counsel, that's a foul word, as far as the court
2 is concerned, because I hope the parties don't think that
3 yours is the only case that this court has to address. I've
4 got a heavy docket. I've got enormous numbers of cases that
5 we have to deal with. And when the parties file compound and
6 multiple motions with supplemental briefing and surreply,
7 that doesn't help your case.

8 If you've got an argument to make, you make it. Don't try
9 and hold off an argument until the very end in a surreply or
10 in a reply and then motivate the opposition to file an
11 additional brief. That just compounds the work that the
12 court has to do. That compounds how you have to litigate
13 your case and it doesn't do justice for either party.

14 So I'm not going to resolve your conflict, counsel, as far
15 as logistical problems. But I will direct that you do meet
16 and confer with opposing counsel and see if you can find a
17 remedy that addresses what actually needs to be filed with
18 this court and how you can streamline the litigation as
19 opposed to protracting the litigation.

20 So inundating is not a favored word with this court and
21 certainly not with me.

22 MR. HIBEY: Your Honor, this is Jim Hibey, I did not
23 mean to suggest that we, or the other side, wants to file
24 paper on paper. And I didn't mean to offend the court if I
25 did. So I apologize. The only point I was trying to make is

11:01:08 1 we've got a date coming up for summary judgment. And what
11:01:11 2 the court has ordered is going to affect those motions. And
11:01:15 3 so we're going to have to -- we will meet and confer, but I
11:01:19 4 don't think it unreasonable to preview for the court the fact
11:01:25 5 that August 2nd may not be a date that we want to keep for
11:01:34 6 summary judgment, because of the fact there's going to be
11:01:36 7 more expert reports, and we should only be taking one
11:01:39 8 deposition as opposed to multiple depositions on these
11:01:42 9 issues, with respect to the expert. And so all that is just
11:01:45 10 going to postpone things. That's all I was trying to
11:01:48 11 suggest.

11:01:49 12 THE COURT: Well, counsel, the parties know this case
11:01:52 13 far better than the court. And the parties can figure out
11:01:54 14 different ways of streamlining the efficiencies, so if you
11:01:58 15 want this matter truly resolved or if you can resolve it with
11:02:02 16 or without the court, that's up to you. But, again, that's
11:02:07 17 an effort that can be engaged in with both parties as opposed
11:02:10 18 to seeking court intervention on every single line item that
11:02:14 19 you have between now and the trial date.

11:02:16 20 MR. HIBEY: I understand.

11:02:17 21 THE COURT: All right. Anything further from the
11:02:18 22 defense?

11:02:19 23 MR. HIBEY: No, Your Honor. I think that's it.

11:02:21 24 THE COURT: Anything further from the parties? From
11:02:24 25 the plaintiff?

11:02:26 1 MR. HUESTON: No, Your Honor.

11:02:27 2 THE COURT: Okay. Thank you, counsel.

11:02:29 3 I hope this is more of an efficient way of addressing the
11:02:33 4 motions. And, again, we'll get out to you a very brief order
11:02:36 5 that just summarizes the court's final rulings and
11:02:38 6 determinations. Have a good day. We'll be in recess. Thank
11:02:41 7 you.

8 (The proceedings were adjourned.)

9

10 C E R T I F I C A T E

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12

13 I certify that the foregoing is a correct transcript from
14 the record of proceedings in the above-entitled matter.

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17

18 /s/ Debbie Zurn

19 DEBBIE ZURN
20 COURT REPORTER

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